STATE OF MICHIGAN

COURT OF APPEALS

JOHN A. SIMONSON,

Plaintiff-Appellant,

v

ROBERT K. PELTON and DANA C. PELTON,

Defendants-Appellees.

UNPUBLISHED
July 15, 2010

No. 291465
Lake Circuit Court
LC No. 08-007313-CH

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

In this action to quiet title and for trespass and ejectment, plaintiff appeals the trial court's judgment, which, in part, denied attorney fees under the offer of judgment rule, MCR 2.405,[1] based on a finding that plaintiff's pretrial offer of judgment was not for a "sum certain," as required by MCR 2.405(A)(1). On appeal, plaintiff contends that the posttrial judgment was more favorable than the terms of the offer of judgment, and therefore the plain language of MCR 2.405 mandates an award of attorney fees, even though the offer of judgment included an equitable disposition to quiet title. Because we find no error in the trial court's ruling, we affirm.

This case arises from a property dispute. The parties own adjoining parcels of land in Lake County, Michigan, and some years ago defendants commissioned a timber harvest on their property. Approximately five years later they constructed a fence around what would eventually become the disputed parcel of land. After observing the fence, plaintiff believed it encroached on his property, as did the timber harvest years before. He informed defendants of the perceived encroachment, but defendants believed they owned the disputed parcel, based on an old survey and steel posts and ribbons on the property. Plaintiff filed the instant action to quiet title, to eject defendants from the disputed parcel, and for trespass damages resulting from the timber harvest.

Before trial, plaintiff submitted to defendants a written offer to stipulate to an entry of judgment pursuant to MCR 2.405 to resolve the issues and end the lawsuit. According to the terms of the proposed judgment, plaintiff's title to the disputed parcel would supercede

[1] Generally, MCR 2.405 allows a party to submit to an adverse party a written offer to stipulate to the entry of a judgment in a sum certain. See *infra*.

defendants', and any and all persons claiming title through defendants. It also described and established the boundary lines of the disputed parcel. The proposed judgment also required defendants to remove the fence, livestock, and "all other encroachments within 40 days of the judgment" and that if defendants failed to comply, "plaintiff [was] authorized to hire a contractor to remove the same at Defendants' cost and expense, and that a Judgment be entered for the costs of such removal." It further granted plaintiff leave to record the judgment with the Lake County register of deeds to preserve his superior interest in the disputed parcel. Finally, the proposed judgment also awarded plaintiff $3,180 for the value of timber removed from his property, and $252 in costs. Defendants did not respond to plaintiff's offer, which, pursuant to MCR 2.405(C)(2)(b), see *infra*, constituted a rejection.

At trial, plaintiff prevailed on all counts in his complaint. He then filed a proposed judgment with the trial court, pursuant to MCR 2.602(B)(3), that was identical to the terms of the offer of judgment he previously submitted to defendants, except that it included $5,675.38 in costs ($5,004.80 of which constituted attorney fees), $400 for forester services, and $790 for survey fees, in addition to $3,180 for the value of the timber. The trial court entered a judgment that mirrored plaintiff's proposed judgment in all respects with the exception of attorney fees, which it denied. Plaintiff moved for reconsideration on the issue of attorney fees and argued that because the final judgment was more favorable to him than the offer of judgment, attorney fees were mandated as a "cost" pursuant to MCR 2.405.[2] The trial court disagreed, and ruled that plaintiff's offer of judgment was not for a "sum certain" because it included provisions to quiet title in addition to damages. This appeal ensued.

On appeal, plaintiff claims that the trial court erred when it denied attorney fees as a part of actual costs under MCR 2.405 where defendants rejected plaintiff's unconditional offer to stipulate to the entry of a judgment in a sum certain and to quiet title, and where plaintiff obtained a post-trial judgment that included damages in excess of the offer of judgment. We disagree.

"We review de novo both the trial court's interpretation of a court rule and its decision to award sanctions." *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007). "We review for clear error the findings of fact underlying an award of attorney fees." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). "'A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made.'" *Id.*, quoting *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002).

At issue here is the interpretation of the offer of judgment rule, MCR 2.405. According to MCR 2.405(B): "Until 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued." An "'[o]ffer' means a written notification to an adverse party of the

---

[2] In addition to attorney fees, plaintiff sought clarification of an innocuous mathematical error in the trial court's monetary award calculation.

offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued." MCR 2.405(A)(1). An offer is rejected if an offeree fails to respond to the offer. MCR 2.405(C)(2)(b). "If an offer is rejected, [and i]f the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action." MCR 2.405(D)(1). The adjusted verdict in this case constitutes the trial court's judgment, "plus interest and costs from the filing of the complaint through the date of the offer." MCR 2.405(A)(4)(b), (5). Because defendants did not make a counteroffer, plaintiff's offer constitutes the "average offer." MCR 2.405(A)(3). "'Actual costs' means the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6).

Here, the parties do not dispute that the adjusted verdict, i.e., the trial court's judgment, was more favorable to plaintiff than plaintiff's offer of judgment because the damage award in the trial court's judgment exceeded the proposed damages in plaintiff's offer of judgment. Thus, because defendants rejected the offer, plaintiff would be entitled to actual costs, including attorney fees, but only if his offer was "to stipulate to the entry of a judgment in a *sum certain*[.]" MCR 2.405(A)(1) (emphasis added). If an offer of judgment is not for a sum certain, it does not meet the requirements of the offer of judgment rule, and the offeror is not entitled to actual costs under the rule. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 299-300; see also *Hessel v Hessel*, 168 Mich App 390, 393-396; 424 NW2d 59 (1988). Thus, the question becomes whether plaintiff's offer of judgment to quiet title and for damages was for a sum certain.

In *Knue v Smith*, 478 Mich 88; 731 NW2d 686 (2007), a case discussed by both parties as germane to the resolution of this issue, the Supreme Court considered whether an offer of judgment in an action to quiet title constituted a "sum certain." The pertinent facts and procedural history are as follows:

> Plaintiffs filed an action to quiet title asserting that they had acquired title to a small strip of land through adverse possession or acquiescence. During the pendency of the lawsuit, plaintiffs' counsel sent defense counsel a letter on May 16, 2003, presenting an offer for settlement that he characterized as a "stipulation of entry of judgment" pursuant to MCR 2.405. The offer was that in return for payment by plaintiffs to defendants of $3,000 the defendants would convey the disputed land to plaintiffs by quitclaim deed and the parties would stipulate a dismissal of all claims "with prejudice and without costs." Counsel for defendants replied by letter, acknowledging the offer but contesting that this qualified as an offer of judgment pursuant to MCR 2.405.
>
> The offer was not accepted and a bench trial was held. The trial court entered a judgment and order quieting title in plaintiffs' favor. Plaintiffs subsequently filed a motion seeking actual costs and attorney fees under the offer of judgment rule, MCR 2.405(D)(1). They asserted that the offer of settlement of May 16, 2003, qualified under the offer of judgment rule and, as the adjusted verdict at the conclusion of the trial was more favorable to the plaintiffs than the offer, they were entitled to offer of judgment sanctions.

> Defendants opposed the motion, arguing that the offer was not for a sum certain because this was an equitable action, and even if this argument was unavailing the court should decline to award sanctions under the "interest of justice" exception set forth in MCR 2.405(D)(3). [*Id.* at 90-91 (opinion by TAYLOR, C.J.)]

The trial court granted the plaintiffs' motion and the Court of Appeals affirmed. *Id.* at 91.

On these facts, and after reviewing the plain language of MRE 2.405, Justice Taylor, writing for the plurality, reasoned that "[t]here is no latitude given in this rule for offers of judgment that culminate in something other than a 'judgment for a sum certain.'" *Id.* at 93. "That is, it is nonconforming for the offer to require a reciprocal exchange of cash for the execution of a recordable real estate document culminating in a judgment of dismissal with prejudice and without costs. For such an offer, the offer of judgment rule is simply inapplicable[.]" *Id.* Thus, Justice Taylor concluded, the plaintiffs' tendered offer did not culminate in a judgment for a sum certain and "fell outside the scope of MCR 2.405(A)(1)." *Id.* (CAVANAGH and CORRIGAN, JJ., concurring). Justice Young concurred in a separate opinion, which stated in its entirety: "I concur in the result only. Because plaintiffs' offer required a quit claim deed in addition to the transfer of $3,000, the offer could not be for a sum certain. Therefore, MCR 2.405 does not apply to this case." *Id.* at 97 (YOUNG, J., concurring) (WEAVER, J., concurring). Justice Kelly also concurred with the result, but stated in a separate opinion, "I would hold that the offer judgment rule . . . is inapplicable when equitable relief is sought." *Id.* at 94 (KELLY, J., concurring). Justice Markman dissented in a separate opinion. *Id.* at 97-98 (MARKMAN, J., dissenting). The Court ultimately remanded for an entry denying the plaintiffs' motion for sanctions under the offer of judgment rule. *Id.* at 94 (TAYLOR, J.).

Here, the facts indicate that plaintiff's offer required that in exchange for the judgment, defendants must have agreed that plaintiff's title to the disputed property superceded defendants' and that plaintiff be granted leave to file his title with the county register of deeds. Like *Knue*, we find that this was not an offer to stipulate to the entry of a judgment for a sum certain. Moreover, plaintiff's offer also required defendants to perform several subsequent acts within 40 days after the entry of the judgment, including removal of the fence, livestock, and other unidentified encroachments, as a condition to the judgment. If defendants failed to meet these conditions, plaintiff was authorized to hire a contractor to remove the items at defendants' cost and expense. Such conditions likewise do not constitute a sum certain. See *Best Fin Corp v Lake State Ins Co*, 245 Mich App 383, 387-388; 628 NW2d 76 (2001) (MCR 2.405 requires at the very least that an offer be in writing and unconditional). Additionally, we find that plaintiff's requirement that defendants remove "all other encroachments" is vague at best, and cannot constitute a sum certain. Thus, we conclude that the trial court correctly ruled that plaintiff did not offer to stipulate to the entry of a judgment for a sum certain, and that plaintiff is therefore not entitled to costs or attorney fees under MCR 2.405.[3]

[3] We also reject plaintiff's claim that he was entitled to statutory attorney fees of $150 pursuant to MCL 600.2441(2)(C). First, we note that the plain language clearly indicates that any amount
(continued…)

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering

(…continued)

awarded under this statute comprises costs, not attorney fees. Second, the record indicates that plaintiff was awarded more than $150 in costs, and on appeal plaintiff has not shown that his award did not include costs under this statute. Thus, plaintiff has not established that the trial court committed any error. It is generally the appellant's responsibility to meet their burden of proof on appeal. *In re 1987-88 Med Doctor Provider Class Plan*, 203 Mich App 707, 726; 514 NW2d 471 (1994). Plaintiff has not met this burden.